IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Blue Macellari, an individual, Plaintiffs, vs. Rusty Carroll, an individual, R2C2, Inc., a corporation, and DigitalSmiths Corporation, a corporation, Defendants.	)	Civil Action No. 05-4161-JPG

MEMORANDUM IN SUPPORT OF
DEFENDANT DIGITALSMITHS MOTION TO DISMISS

INTRODUCTION

Plaintiff brought the above-captioned lawsuit against Defendant DigitalSmiths Corporation ("DigitalSmiths") alleging that a web site hosted by DigitalSmiths as internet service provider ("ISP") posted a research paper which belongs to the Plaintiff. Specifically, Plaintiff's Complaint alleges six separate counts against DigitalSmiths: (1) Vicarious Copyright Infringement; (2) Contributory Copyright Infringement; (3) Consumer Fraud and Deceptive Business Practices; (4) Defamation; (5) False Light Invasion of Privacy; and (6) Unjust Enrichment. For the reasons set forth below, DigitalSmiths has moved to dismiss each of the claims which has been brought against it.

ARGUMENT

I. Plaintiff's Claims for Vicarious and Contributory Copyright Infringement Fail Because of Plaintiff's Lack of a Copyright Registration.

Although Plaintiff has brought two distinct claims against DigitalSmiths for violations of the Copyright Act, it is clear that Plaintiff does not hold a copyright registration for her research

Dockets.Justia.com

paper. It is well established that registration of a copyright is a prerequisite to filing suit for copyright infringement. See 17 USC § 411(a) ("No action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title . . . "); Leventhal v. Schenberg, Copy. L. Rep. (CCH) P28,841 (N.D. Ill. 2004) (Motion to Dismiss granted where Plaintiff did not allege that he had acquired a registration of a copyright, which was a prerequisite to bringing an action for copyright infringement); Markovitz v. Camiros, Ltd., 2003 U.S. Dist. LEXIS 11150, *3 (N.D. Ill. 2003) ("The failure to obtain copyright registration bars a plaintiff from bringing suit under the Copyright Act."); see also Well-Made Toy Mfg. Corp v. Goffa Intern. Corp., 354 F.3d 112, 116 (2d Cir. 2003) (holding that district court was barred from considering copyright infringement claim where the copyright was not registered).

In the present case, Plaintiff's Complaint explicitly demonstrates that she did not possess ownership of a copyright registration in her research paper at the time she filed suit in this case. Specifically, Paragraph 30 of the Complaint alleges that Plaintiff only recently ***filed*** for a registration, but she clearly had not received a registration at the time she filed her Complaint. No other paragraphs of the Complaint specifically allege receipt and/or ownership of copyright registration by Plaintiff. Therefore, because she does not hold a valid copyright registration and has not sufficiently alleged ownership of a registration, all of Plaintiff's claims under the Copyright Act must be dismissed.

II. All of Plaintiff's State Law Claims are Barred by the Internet Service Provider Immunity of the Communications Decency Act of 1996.

In addition to the claims brought against DigitalSmiths under the Copyright Act, Plaintiff has brought four additional claims which rest upon Illinois state law. Specifically, Plaintiff has brought claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices

Act, Defamation, False Light Invasion of Privacy, and Unjust Enrichment. Each of these state law claims are barred by federal law and should therefore be dismissed.

The Internet Service Provider immunity section of the Communications Decency Act of 1996, codified at 47 USCS § 230, provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This section has been construed to broadly immunize Internet Service Providers such as DigitalSmiths from liability for state law causes of action. Specifically, the interpretive notes of § 230 provide that the "Communications Decency Act of 1996 (47 USCS § 230) immunized interactive computer service providers from liability for material posted through their services by third parties." 47 USCS § 230 citing Zeran v America Online, 129 F3d 327 (4th Cir. 1997).

Federal courts around the country have held that state law claims nearly identical to those brought by the Plaintiff in this case against DigitalSmiths are barred by 47 USCS § 230. Green v. Am. Online, 318 F3d 465 (3rd Cir. 2003) (customer's claims against ISP for actions of John Does who allegedly defamed him in chat rooms were dismissed because ISP had immunity under 47 USCS § 230); Corbis Corp. v Amazon.com, Inc., 351 F Supp 2d 1090 (W.D. Wash. 2004) (causes of action against ISP for violations of state Consumer Protection Act, Wash. Rev. Stat. § 19.86.020 et seq., were barred by 47 USCS § 230, where third parties ultimately decided what information to put on websites); Patentwizard, Inc. v Kinko's, Inc. 163 F Supp 2d 1069 (D.S.D. 2001) (Provider of interactive computer services could not be held liable under state law for defamation based on statements made on Internet by third party); Ramey v. Darkside Prods., 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004) (immunity provided by 47 USCS § 230 barred Plaintiff's claim for unjust enrichment).

In light of the foregoing authority, each of Plaintiff's state law claims is barred by the immunity provided by the Communications Decency Act.

III. Plaintiffs' State Law Claims All Fail on the Merits as Well.

Without restating each of the arguments previously set forth by Co-Defendants Rusty Carroll and R2C2 in their recently filed Motion to Dismiss and Memorandum in Support, DigitalSmiths hereby incorporates by reference the arguments contained in those filings. Specifically, DigitalSmiths contends that:

- Plaintiff does not have standing to sue under the Illinois Consumer Fraud and Deceptive Business Practices Act. Champion Parts, Inc. v. Oppenheimer & Co., 878 F.2d 1003 (7th Cir. 1989); DeJohn v. TV Corp. Int'l, 245 F. Supp. 2d 913 (N.D. Ill. 2003); Swartz v. Schaub, 818 F. Supp. 1214 (N.D. Ill. 1993); Barille v. Sears Roebuck & Co., 682 N.E.2d 118 (Ill. App. 1997).
- Plaintiff has failed to plead a proper claim for defamation as she has not identified a single false statement made by DigitalSmiths. Chisolm v. Foothill Capital Corp., 3 F.Supp. 2d 925 (N.D. Ill. 1998). Further, Plaintiff has failed to plead any special damages arising from her defamation claim. Quilici v. Second Amendment Found., 769 F.2d 414, 417 (7th Cir. 1985); American Needle & Novelty Inc. v. Drew Pearson Marketing, Inc., 820 F.Supp. 1072, 1076 (N.D. Ill. 1993). Finally, Plaintiff's Defamation claim is preempted by the Copyright Act. See 17 U.S.C. § 301(a); Toney, 406 F.3d at 909-10.
- Plaintiff's False Light Invasion of Privacy claim is preempted under the Copyright Act and fails to state a claim. 17 U.S.C. § 301(a); Grossman v. Smart, 807 F.Supp. 1404 (C.D.Ill. 1992); Toney v. L'Oreal USA, Inc., 406 F.3d 905, 909-10 (7th Cir. 2005).

- Plaintiff's Unjust Enrichment claim is preempted by the Copyright Act. 17 U.S.C. 301(a); ATC Distribution Group, Inc. v. Whatever It Takes Transmission & Parts, Inc., 402 F.3d 700 (6th Cir. 2005); Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296 (2d Cir. 2004).

CONCLUSION

For the foregoing reasons, DigitalSmiths requests that each of Plaintiff's causes of action against it be dismissed with prejudice.

Respectfully submitted,

/s Mark Sableman
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
Illinois Bar #03124424

OF COUNSEL:

Matthew Patterson
Kevin A. Hall
NELSON MULLINS RILEY & SCARBOROUGH
1320 Main Street
17th Floor Meridian Building
Columbia, SC 29201
803-255-9577
FAX 803-256-7500

Attorneys for Defendant DigitalSmiths Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 28, 2005, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Mr. Douglas S. Teasdale
Teasdale, Murphy & O'Grady, LLP
1001 Washington Avenue
Suite 360
St. Louis, MO 63101

Evan Parke
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, DC 20005-3096

James Bennett
K. Lee Marshall
Bryan Cave LLP
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

and was mailed by U.S. Mail, first class postage prepared to:

Melise Blakeslee
Mark Davis
Sarah Brown
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, DC 20005-3096

/s Mark Sableman
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
Illinois Bar #03124424